U.S. Department of Justice

Antitrust Division

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

September 26, 1994

Mr. William Cator
Commission Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: GN Docket No. 93-252

Dear Mr. Cator:

Enclosed please find two copies of the Ex Parte Comments of the United States Department of Justice which are being submitted to the Federal Communications Commission in the matter of: Implementation of Sections 3(n) and 332 of the Communication Act: Regulatory Treatment of Mobile Services.

Sincerely,

Deborah R. Maisel
Attorney
Communications & Finance Section

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

EX PARTE COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

I. INTRODUCTION[1]

The Federal Communications Commission ("Commission") released a Second Further Notice of Proposed Ruling Making ("Notice") on July 20, 1994. In this Notice the Commission seeks comment on whether it should consider certain non-equity relationships, which the Commission suggests do not rise to the level of control under the *Intermountain*[2] test, to be attributable interests for purposes of applying the 40 MHz limitation on personal communications services ("PCS") spectrum, the PCS-cellular cross-ownership rules, or a more general commercial mobile radio service ("CMRS") spectrum cap.[3]

---

[1] Two copies of this ex parte presentation have been submitted under separate cover to Mr. William Cator, Commission Secretary.

[2] Intermountain Microwave, 24 Rad. Reg. (P&F) 983, 984 (1963).

[3] See, e.g., Notice ¶ 7 ("[i]n this proceeding our purpose is to examine whether management agreements which do not involve any relinquishment of control under the Intermountain test still should be deemed to confer attributable interests to the managing party under the agreement").

The Commission requested comment in a prior Further Notice of Proposed Rule Making on a proposal to establish a general cap on the amount of CMRS spectrum for which an entity may be licensed in a particular geographic market.[4] The stated purpose of the proposed spectrum cap is to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market. The United States Department of Justice ("Department"), one of the Federal agencies responsible for enforcing the antitrust laws and promoting competition,[5] has participated in prior Commission proceedings involving the role of competition in radio telecommunications,[6] and offers these comments for the Commission's consideration as it attempts to develop a competitive market for wireless services.

---

[4] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 94-100 (released May 20, 1994) (Spectrum Cap Notice).

[5] The antitrust laws, including the Sherman Act, 15 U.S.C. § 1 et seq., and the Clayton Act, 15 U.S.C. § 12 et seq., generally prohibit agreements that restrain competition, transactions (such as mergers) that tend to restrain competition or create monopolies, and the acquisition or use of monopoly power. The submission of these comments does not affect the Department's independent enforcement responsibilities. See, e.g., United States v. RCA, 358 U.S. 344, 350 n.18 (1959).

[6] See, e.g., Comments of the U.S. Department of Justice, In the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314 (filed November 9, 1992).

II. DISCUSSION

The Department believes that joint marketing and management agreements, or other non-equity relationships which, according to the Commission's Notice, may not establish *de facto* or *de jure* control under the *Intermountain* criteria, might raise competitive concerns. Specifically, where, at a minimum, one of the parties to such agreements has the power to determine or significantly affect prices or service output for two or more CMRS licensees in the same geographic market, the Department believes that the Commission should treat those non-equity relationships or agreements as attributable interests for the purpose of applying the 40 MHz limitation on personal communications services ("PCS") spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap.[7/]

Where two firms, one of which is an actual CMRS licensee and the other may or may not be, form a joint marketing agreement, management agreement or other type of non-equity relationship, and one of the firms to that agreement thereby derives the power to determine or significantly affect the prices or service offerings of two or more CMRS licensees in a given geographic market, that firm effectively controls the competitive capabilities of both of those licensees, and thus

---

[7] The Department has supported temporarily limiting the acquisition of multiple PCS licenses or common ownership of cellular and PCS licenses in a given geographic market, as accomplished by the proposed spectrum cap. See Comments of the U.S. Department of Justice, In the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314 (filed Nov. 9, 1992).

can significantly constrain the scope for competition between them. The potential for reduced competition from an agreement which allows a firm to determine or significantly affect prices or service offerings for two or more CMRS licensees is obvious when the agreement pertains to multiple licenses within a particular geographic market. Such an agreement could effectively create a single economic entity and virtually eliminate any possibility of meaningful competition in that market between the licensees subject to the agreement.

In addition, non-equity agreements that allow the parties to the agreement to determine or significantly influence prices or service offerings for a single CMRS license within a particular geographic market can, in certain circumstances, raise similar horizontal concerns. The horizontal competitive concern in these agreements arises when one (or more) of the parties to the agreement controls a CMRS license in a market where, through the agreement, it also determines or significantly influences prices or service offerings for an additional license in that same market. For example, if a party to the joint marketing agreement owns several CMRS licenses and includes some of those licenses in the joint marketing agreement, but excludes others, that party has the power to set prices both for the licenses included within the agreement and for the licenses it owns that are excluded from the agreement. If an excluded license owned by that party is in the same geographic market as a license included within the agreement (but owned by a second party), that first party will be aiding in

setting the prices for two licensees in the same geographic market, and there will be little incentive for these two licensees to compete.[8/]

Some types of non-equity relationships, including some joint marketing and management agreements (which in form can vary widely), may have important procompetitive characteristics. For example, management agreements can provide new entrants with access to technical and other types of expertise and economies of scope and scale. In addition, interoperability agreements, roaming/resale agreements, quality of service agreements and trademark/brand name agreements can also all increase the value of CMRS services to consumers. Accordingly, the Department believes that the Commission should not treat as attributable interests those non-equity relationships or agreements (including management and joint marketing agreements) that do not enable a party to the agreement to determine or significantly influence prices or specific service offerings for two or more CMRS licensees in a single geographic market, for purposes of the 40 MHz limitation on personal communications services ("PCS") spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap.

---

[8] For example, consider the case of a joint pricing agreement that pertains to a single CMRS license in each of two markets - call them markets A and B - and assume that one of the parties to the agreement is a licensee in each of the markets, but this party only includes its A license in the agreement. By construction, the excluded B license is located in a geographic market where the joint pricing agreement is in effect. Since the owner of the excluded license has power over the price of both its (excluded) B license and the B license that is subject to the joint pricing agreement (owned by some other party), both B licenses should be treated as attributable interests for the purposes of the proposed CMRS spectrum cap.

III. CONCLUSION

The Commission has proposed a general CMRS spectrum cap to ensure that no provider will exert market power by controlling large amounts of spectrum in a given geographic market. Joint marketing agreements, management agreements, and other types of non-equity relationships that, according to the Commission, may not amount to *de facto* control under the *Intermountain* criteria, could create a vehicle to coordinate prices and services if they allow a party to the agreement to determine or significantly affect prices or specific service offerings for two or more CMRS licensees in a single geographic market. Absent an attribution rule such agreements could be used to obtain power over price. Consequently, the Department recommends that the Commission treat non-equity relationships or agreements that allow a party to the agreement to determine or significantly influence prices or specific service offerings for two or more CMRS licensees in a single geographic market as attributable interests for purposes of the 40 MHz limitation on personal communications services ("PCS") spectrum, the PCS-cellular cross-ownership rules, or a more general CMRS spectrum cap.

Respectfully submitted,

Anne K. Bingaman
Assistant Attorney General

Robert E. Litan
Deputy Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Washington D. C. 20530

Richard Liebeskind
Assistant Chief
Communications and Finance Section

John B. Hayes
Economist
Competition Policy Section
Antitrust Division
U.S. Department of Justice
555 Fourth Street, N.W.
Washington, D.C. 20001

Deborah R. Maisel
Attorney
Communications and Finance Section

Kathleen Soltero
Attorney
Communications and Finance Section
Antitrust Division
U. S. Department of Justice
555 Fourth Street, N.W.
Washington, D.C. 20001
(202) 514-5800

September 26, 1994

CERTIFICATE OF SERVICE

I, Gregory J. Phillips, one of the paralegals for the United States, hereby certify that I have on this day caused to be served the Ex Parte Comments of the United States Department of Justice,

by hand to:

William Cator, Commission Secretary
Federal Communications Commission
Washington, D.C. 20554

Reed Hundt, Chairman
Federal Communications Commission
Washington, D.C. 20554

Andrew C. Barrett, Commissioner
Federal Communications Commission
Washington, D.C. 20554

Rachelle B. Chong, Commissioner
Federal Communications Commission
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
Washington, D.C. 20554

James H. Quello, Commissioner
Federal Communications Commission
Washington, D.C. 20554

Greg Rosston
Office of Plans & Policy
Federal Communications Commission
Washington, D.C. 20554

Leila Brown
Mobile Services Division
Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

by facsimile to:

Paula J. Fulks
175 E. Houston
Room 1218
San Antonio, TX 78205
Counsel for Southwestern Bell Corporation

Caressa D. Bennet
2120 L Street, N.W.
Suite 520
Washington, D.C. 20037
Regulatory Counsel for Rural Cellular Association

Jay C. Keithley
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
Counsel for Sprint Corporation

Andre J. Lachance
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
Counsel for GTE Service Corporation

William B. Wilhelm, Jr.
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
Counsel for National Cellular Resellers Association

Raymond G. Bender, Jr.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
Counsel for Vanguard Cellular Systems, Inc.

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
Counsel for Cellular Service, Inc.

Michael F. Altschul
Vice President/General Counsel
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

John S. Fischer
Vice President of Legal Affairs
LCC, L.L.C
2300 Clarendon Boulevard
Suite 800
Arlington, VA 22201

William J. Balcerski
120 Bloomingdale Road
White Plains, NY 10605
Counsel for NYNEX Corporation

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036

William J. Franklin, Chartered
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
Counsel for Simrom, Inc.

William J. Franklin, Chartered
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
Counsel for PCC Management Corporation

Lon C. Levin
Vice President and Regulatory Counsel
American Mobile Satellite Corporation
10802 Park Ridge Boulevard
Reston, VA 22091

Eliot J. Greenwald
Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
Counsel for PlusCom, Inc.

Betsy Stover Granger
140 New Montgomery Street
Room 1525
San Francisco, CA 94105
Counsel for Pacific Bell Mobile Services

Mary E. Brooner
Manager, Wireless Regulatory Policies
Motorola Inc.
1350 I Street, N.W.
Washington, D.C. 20005

Joe D. Edge
Drinker, Biddle & Reath
901 Fifteenth Street, N.W.
Suite 900
Washington, D.C. 20005
Counsel for Puerto Rico Telephone Company

John A. Malloy
General Counsel
Columbia PCS, Inc.
201 N. Union Street
Suite 410
Alexandria, VA 22314

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W.
Suite 700
Washington, D.C. 20006
Counsel for American Mobile Telecommunications Association, Inc.

James L. Winston
Rubin, Winston, Diercks, Harris & Cooke
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
Counsel for The National Association of Black Owned Broadcasters, Inc.

Laura L. Holloway
General Attorney
Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006

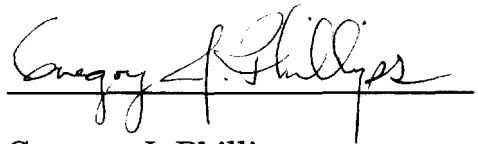
David Cosson
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Counsel for the National Telephone Cooperative Association

Jim O. Llewellyn
BellSouth Corporation
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

Ronald E. Blaylock
President
ROMGAT Communication, L.P.
245 Park Avenue
17th Floor
New York, NY 10167

Gerald S. McGowan
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W.
Suite 700
Washington, D.C. 20006
Counsel for Dial Page, Inc.

September 26, 1994



Gregory J. Phillips